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JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 701.

SYLVESTER POLIAFICO,
SALVATORE LAZZARO,
NUNZIO ROMANO,
BEN YOSLOVITZ,
ANTHONY CRISCI,
SALVATORE PIERI,
MICHAEL ERRA,
ANTHONY NASELLI,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A REHEARING.

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PETITION FOR A REHEARING.

Now come the undersigned attorneys for all appellants herein, and present this, their petition for a rehearing of the above-entitled cause, and in support thereof respectfully state:

That this Court denied the petition for certiorari, that was filed herein, on the 4th day of March, 1957.

In petitioning for a rehearing the undersigned counsel feel impelled to direct this Court's attention to a number of the arguments which form the basis of the appeal in this case, and counsel must direct this Court's attention to the questions with which issue is taken.

GROUNDS RELIED UPON.

1. In the Petition for Certiorari it was contended in behalf of petitioners Poliafico and Pieri that venue of Counts Nos. 11 and 16 was improperly laid in the Northern District of Ohio because the evidence showed that the activities alleged in those counts took place in Buffalo, New York, and Erie, Pennsylvania (Petition 37-38) with no warning on the face of the indictment to the contrary.

2. The testimony of Filicia over objection of counsel, who apprised the Court that Filicia had played a dual role as a Government informer and as a defendant who sat for ten days in a Courtroom and who had previously prepared his case with present counsel and the defendants.

3. The refusal of the District Court to charge as requested in regard to petitioner Poliafico's character evidence, and whether such refusal constituted a conflict between the Second and the Sixth Circuits as against the Seventh and the Tenth Circuits.

4. Motions to dismiss indictment should have been granted on ground of variance as set forth in Kotteakos vs. U. S., 328 U. S. 750.

5. The petit jury was improperly drawn.

6. Admission of statements of co-conspirator over objection after termination of conspiracy.

7. The reading from the Grand Jury testimony of Government witnesses, Brunello and Artino, over objection, constituted prejudicial and reversible error.

ARGUMENT ON GROUND 1.

Petitioners Poliafico and Pieri contend that venue of Counts Nos. 11 and 16 was improperly laid in the Northern District of Ohio because the evidence showed that the activities alleged in those counts took place in Buffalo, New York, and Erie, Pennsylvania. Consequently, the evidence did not support these two counts. The evidence showed that narcotics were turned over in New York and Pennsylvania. The Government claimed that the petitioners had knowledge that the narcotics would be transported into the Northern District of Ohio and venue would lie in either state.

We believe such a holding as applicable to this case is erroneous. Counts Nos. 11 and 16 are substantive offenses. To prove either one of these offenses it would be necessary for additional evidence than was introduced. No narcotics either as exhibits, or otherwise, were introduced. All that did take place in regard to narcotics was talk. A witness explained that what was held to be the narcotics in these counts was destroyed. Co-conspirator, Mandanici, testifying fifteen months later, claimed that part of the alleged narcotics that he turned over in October, 1953, was mixed in with the mixture of 42½ ounces containing 7.2% heroin which was later destroyed by the agent and was not available in this case as an exhibit.

He was the only witness on that important phase of Counts Nos. 11 and 16. Nothing else was offered in evidence to support that this mixture of 42½ ounces, which is four times the amount allegedly received by him in Erie, actually included the alleged Erie package or that the alleged Erie package was actually narcotics. We objected at the time and later on in the charge, but it remained in the case. We feel that was error. If we are to accept merely the word of this type of persons, like

Mandanici and Filicia, without corroboration to make substantive offenses for which these petitioners received five and ten years, it would seem a very dangerous precedent and an unsafe method in which to conduct a case, highly improper and certainly containing all sorts of doubts and falsehoods. On this same evidence of this type of witness we must assume that these petitioners had possession from which venue can be established; we must assume that they had knowledge that it would be taken into interstate commerce; **we must assume that it was narcotics;** that it was unstamped and that it was imported into the United States illegally; we must also assume that all of this was done with knowledge. That is the best example that counsel know of for building an inference upon an inference coming from most questionable sources, unreliable in every manner, without any support or any evidence to corroborate them on the principal issues, namely, the original possession in Buffalo, New York, and Erie, Pennsylvania, by these petitioners. We believe more than that is required to establish a criminal case of this nature and this certainly has not been done in the two substantive counts for which Poliafico received ten years and Pieri received five years, to run consecutively with the conspiracy count of five years in each case.

That, of course, is not our only complaint in connection with these two substantive counts. Our first complaint is that venue was charged in the substantive counts as being in the Northern District of Ohio and not in either Buffalo or Erie. The evidence came in that the offenses were committed in Buffalo and Erie. This was the very first knowledge that counsel had of the commission of these offenses in Buffalo and Erie and not in the Northern District of Ohio, as laid in the indictment. We then im-

mediately objected and informed the Court that venue was not in the Northern District of Ohio and that the Court was without jurisdiction on these two offenses. These objections were timely. It must be remembered that in the substantive offenses it is charged that these alleged crimes took place in the Northern District of Ohio. The evidence as was introduced, as we stated above, through the most corrupt type of witnesses, indicated a completed transaction in Buffalo and in Erie. There was no evidence by anyone in connection with these two cities where these alleged offenses took place that there was any conversation or any understanding as to what would be done with the package that Mandanici received in Buffalo and in Erie. Nor is there any evidence that it was given with the knowledge of these petitioners to Angelo Filicia, who later claims to have taken the package to Cleveland. It was in every way a completed offense of purchase. No part of this offense was included as a facilitation of the transportation from either of these two cities to the Northern District of Ohio, and the evidence falls far short to come under the provisions of 18 U. S. C. 3237, as is claimed in the Government's Brief in Opposition on page 13, which is evidently based upon the case of *Stoppelli vs. United States,* 183 F. 2d 391. That case cited Section 3237 of Title 18, the Venue Section, which reads:

> "Except as otherwise expressly provided, by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed."

While this particular section might have applied to Stoppelli, it did not apply to Poliafico and Pieri. In the *Stoppelli* case it is very clear that venue could have been

placed in New York as well as in California. That while the transfer of the narcotics took place in New York and was transported to California, the reason that venue was laid in California was because an actual sale of narcotics took place in California after the shipment from New York, and of course that makes a different situation entirely. In *Stoppelli* it wasn't necessary to rely upon all these elements of knowledge of transportation by the original transferor in New York, or knowledge of concealment in California, because there was a clean-cut question there, and there was a sale of narcotics in California from this shipment. Of course the venue could be placed either in New York or in California. But nothing like that happened in the case at bar. No sale is charged to these petitioners in the Northern District of Ohio of these alleged narcotics. In fact, the Court dismissed the two counts of sale (Counts Nos. 10 and 15), because there was no evidence to establish them.

In this connection we believe the statement of the Government in the District Court in reply to a motion made by counsel for the defendants, and including the present petitioners, to acquit them because of insufficient evidence on the various counts and for other reasons that were given to the Court, the answer of the United States Assistant District Attorney, Mr. Cockley, becomes important because he was ready to concede that Counts Nos. 11 and 16 should also be dismissed because of this question of venue in the following language (page 101a, Appendix of Poliafico and Pieri):

> "Mr. Cockley: In that event I would like to cover several matters that were discussed yesterday, particularly the substantive counts pertaining to the charge of purchase; and I have reference first to count 3 of the indictment which charges the purchase under

Section 2553 (a). Under the state of the evidence, I believe it is clear that the transfer of that 35 ounces of heroin took place in New York.

"The case that I had reference to yesterday is the case of *United States vs. Pisano,* 193 Fed. 2d, 355, which dealt with the statutory presumption created by Section 2553 (a) of Title 26. However, in further reading that case I find that there was no evidence as to how the heroin there actually came into the possession of the party charged. The court did say under those circumstances that the presumption of venue went with the presumption of possession.

"However, in this case, where there is direct testimony as to the transfer and purchase which occurred in another jurisdiction, I believe the Government is prepared to concede that there is a substantial question as to jurisdiction and we will not further—"

It was there that the Trial Judge made the following remarks:

"The Court: Before you make such a concession I want to direct your attention to the *Stoppelli* case. Are you familiar with that?"

"Mr. Cockley: What case?"

"The Court: *Stoppelli vs. United States,* 183 Fed. 2d 391. That case cited Section 3237 of Title 18, the venue section, which reads:

'Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.'

"Now, in this case, although brief reference is made to the pertinent facts, it would appear that the heroin in question was brought from New York to California and the question was raised there that

> venue was in New York rather than in California, and the court, on the authority of that Section and the state of facts as I have briefly outlined them, held that Section 3237, Title 18 applied, and that venue on that section was in California. It is somewhat similar to our case, although not precisely so. It would seem that in the *Stoppelli* case it was a sale that was charged in California rather than a purchase. Here there is a purchase charged and no sale, and in addition to the purchase in the other counts you charge violation of 174 Title 21."

Even here the Trial Judge said that while (*Stoppelli*) "is somewhat similar to our case, although not precisely so, it would seem that in the *Stoppelli* case it was a sale that was charged in California rather than a purchase."

There is no denying the Court was in doubt when it suggested to the Government not to concede on these two counts because of his opinion of the *Stoppelli* case. And we believe, with good reason, as we pointed out, there is an entirely different factual question in *Stoppelli,* with an entirely different legal question as well. We think the Court was in error here. On page 14 of the Brief in Opposition the Government claims:

> "Moreover, as the Court below held (Pet. 25a), the question of venue was waived by the petitioners by their failure to raise it until the conclusion of the Government's case. See *Lii vs. United States,* 198 F. 2d 109-113 (9); *United States vs. Jones,* 162 F. 2d 72-73 (2); *Hagner vs. United States,* 54 F. 2d 446-447 (C. A. D. C.), Affirmed 285 U. S. 427."

This brings us up again to the question, "Did undersigned counsel have any evidence to go by that the Government did not mean what it said in Counts Nos. 11 and 16 that the transactions in these two substantive offenses took place in the Northern District of Ohio?" The answer

is, "No." We had no notice of any kind and no evidence that the Government did mean what it said by placing venue in the Northern District of Ohio, and not having any such knowledge or notice we could not raise such a question until we reached that particular phase of the evidence which was tending to establish the offenses in Buffalo, New York, and Erie, Pennsylvania, instead of the Northern District of Ohio. If Government counsel could advise this Court how the undersigned counsel knew, or should have known, from the face of the indictment that the Northern District of Ohio is not the real venue, it would be very helpful to the Court and counsel if they would point out where in those two counts we could find any such evidence. Not knowing that the Government intended to introduce completed offenses in other jurisdictions than the Northern District of Ohio, it should be obvious to Government counsel that the petitioners could not have attacked or raised the question of venue until this evidence actually came in, at which time we took the proper objections and exceptions. We think it is reversible error.

The District Judge, while expressing doubts about the applicability of the rationale of the *Stoppelli* case to the case at bar, nevertheless falls into the same error when he says:

> "There is an abundance of authority, I find, that where the question of venue is not raised, when the defendants go to trial without raising it, it is waived. However, it is a question on which my mind is not entirely closed at this time, but I think the Government would be unwise to make any concession until you examine the Stoppelli case."

Now we come to the citations that the Government gave in its reasoning why we are now precluded because

of our failure to raise it until the conclusion of the Government's case. They cite *Lii vs. United States,* 198 F. 2d 109-113. In this case Lii was indicted in the District Court for the District of Hawaii under 18 U. S. C. A. 2421. The indictment was for knowingly procuring an airplane ticket in California to be used by a woman in interstate commerce to go to Hawaii from California for the purpose of engaging in prostitution. The defendant went to trial in Hawaii and then at the end of the trial for the first time raised the objection claiming that the offense charged in the indictment was committed in the Northern District of California and not in the District of Hawaii, and therefore, that the Court was without jurisdiction. The Court, on page 113, says as follows:

> "Appellants here contend that, if committed at all, the offense charged in the indictment was committed in the Northern District of California and not in the District of Hawaii, thus, in effect contending that they were indicted, tried and convicted in the wrong district. The question thus attempted to be raised is a question of venue and not a question of jurisdiction. Having gone to trial on the merits without raising the question, appellants are not permitted to raise it here."

With that opinion we agree, but neither the facts nor the applicable law under that set of facts is applicable to the case at bar. In the *Lii* case the indictment was returned in the United States District Court for the District of Hawaii and claimed that the offense was committed in the District of Hawaii. Lii and his counsel both knew that the crime of purchasing the ticket was in the Northern District of California. They knew that because it so recited in the indictment. Therefore, it was the duty of counsel to raise the question of venue before trial because

of the error alleged in the indictment, and when he chose not to do it and actually went to trial in Hawaii, he waived his right and could not complain thereafter.

How different in our case. In our case the indictment alleges that these petitioners committed the substantive offenses in the Northern District of Ohio. We had no warning that the Government did not really mean that. We had to rely that the evidence would come in to show that the transfer and the purchase of the narcotics would be in the Northern District of Ohio. We could not raise any objection or question of venue under those circumstances. The *Lii* case, of course, is not applicable.

The next case the Government cites is *United States vs. Jones*, 162 F. 2d 72-73. This is a Second Circuit case and a similar question of venue arose therein. Jones was indicted under the Selective Service Training Act for failing to report at a camp in Lapine, Oregon. He was indicted in the Western District of New York for failure to so report. Jones went to trial in the Western District of New York and at the end of the case raised the question of venue, claiming that if he committed a crime at all it was in Oregon and not in the Western District of New York. The Appellate Court in ruling on this question of venue that he raised, as stated above, denied the plea on the ground that Jones was warned by the face of the indictment of the alleged improper venue and that the defendant waived the error by going to trial without first interposing an objection. With this ruling we wholeheartedly agree. But again, this is not the situation in our case. In the *Jones* case the warning was plain. It was right on the face of the indictment where he was accused of committing a crime in the Western District of New York, whereas he and his counsel knew that he was supposed to report in Oregon and if he failed to do so the crime that he committed was

in Oregon and the Court was certainly correct when it said on page 73:

> "But a defendant thus warned by the face of the indictment, of the improper venue, waives the error when he goes to trial without interposing an objection, as the defendant did here."

At a glance, anyone can see that the *Jones* case is not applicable to the case at bar. We were not warned in any way nor had any notice that we could expect any other places of venue except the Northern District of Ohio. We could not have raised any objection before going to trial in view of this natural expectation.

Then the third case that Government counsel cited is the case of *Hagner vs. United States*, 54 F. 2d 446-447 (C. A. D. C.) Affirmed 285 U. S. 427. In this case the appellants were indicted and tried in the Supreme Court of the District of Columbia upon a charge of using the mails to defraud. The evidence showed that the letters were deposited in the City of Scranton, Pennsylvania, and the letters were addressed to certain people in Washington, D. C. An indictment for fraudulently using mails to charge an offense at the place of receipt of the letters must allege that the letters were duly delivered there. However, the letters were deposited in Pennsylvania and the indictment did not on its face show the commission of any crime within the jurisdiction of the District Court at the District of Columbia. The indictment actually did charge an offense in Pennsylvania and not in the District of Columbia. In this case it shows that the defendants were arraigned, pleaded not guilty, and went to trial in the District of Columbia, and were convicted. On page 447 the Appellate Court raises this question, "Was their failure seasonably to object to the jurisdiction of the Trial Court a waiver of the right secured them by Article III, Section

II, of the Constitution to have a trial in the State and District in which the offense is alleged to have occurred?" The Court, on page 449, explains, in giving the answer to this question, that these defendants appeared in Court in the District of Columbia with their counsel. Then and there they had a right to have pleaded to the jurisdiction and raise whatever question of venue is involved herein. They did not. Instead they elected to go to trial on an indictment duly charging a violation of a law of the United States in a Court having a general jurisdiction of the class of offenses charged. Says the Court on page 449:

> "This, we think, was as complete an agreement to waive their Constitutional privilege to be tried in the District of Columbia as though it were in express words. * * *"

Here, again, we have a citation that is similar to the two cited cases above, but none of them is applicable, either in facts or the law, to the case at bar. We must again repeat we did not waive by any act of ours. We had a right to sit down and go to trial on that indictment because it alleged that the petitioners committed two offenses, in the two substantive counts, in the Northern District of Ohio. When the evidence did come in and establish the fact that the crimes were actually committed elsewhere, we immediately objected on the ground of wrong venue, and as this was the first opportunity to have entered the objection, as we stated before, it was the duty of the Court to dismiss as against these petitioners, Counts Nos. 11 and 16 because of wrong venue. By refusing to grant our request for dismissal of these two substantive counts and letting the matter go to the jury, and imposing a sentence, the Court committed prejudicial and reversible error as well as a violation of these petitioners' Constitutional rights.

ARGUMENT ON GROUND 2.

The Testimony of Angelo Filicia.

Petitioners contend that prejudicial error was committed in permitting the witness Filicia, after he pleaded guilty in the midst of the trial, to become a Government witness. We pointed out in our petition for certiorari that all the other witnesses were excluded from the courtroom until called. We are not overlooking the fact that Filicia was first a defendant before he became a witness. We nevertheless urge this point because of the unusual circumstances that prevailed when he took the stand as a witness after his plea of guilty in the middle of a trial where he was a defendant and one day later he became a witness for the Government after such plea. We are not unmindful that as a defendant he was compelled to be in the courtroom throughout the entire time until he pleaded guilty. What we are complaining about is what took place after such time.

When Filicia took the witness stand, Attorney Henry C. Lavine objected in the following language (page 167b,—Government's App.):

> "Mr. Lavine: Your Honor, I believe I made a motion before on this question of either a separation or, in the alternative, that the evidence be stricken out, the same motion that Mr. Redmond was talking about, and I stated that it was based on the community of interest between Filicia and the Government.
>
> The Court: What do you mean by a community of interest such as would exclude the testimony?
>
> Mr. Lavine: Well, my knowledge of it is this, your Honor, that Angelo Filicia cooperated with the attorneys for the defense, with the defendants, and sat in this courtroom for ten days.
>
> (Discussion had.)

I do not know what strategy he went through, but I know that he did confer with a number of the defendants and a number of counsel at the time we were preparing this case.

The Court: Are you suggesting that by reason of his position as a defendant he learned matters that the defense was going to use during the defense of the case?

Mr. Lavine: No question about it.

The Court: That he gave to the Government?

Mr. Lavine: That I don't know.

Mr. Canary: There is a difference, your Honor.

Mr. Lavine: Well, I don't know how the Government may proceed. He is still available, he can be a rebuttal witness, your Honor.

The Court: Well, it will be time enough if the Government uses him and he discloses anything that he learned about in his status as a defendant in the case before he pleaded guilty. But I understand you are not suggesting that any such information as came to his attention as a defendant before he pleaded guilty was communicated by him to the Government?

Mr. Lavine: No, I am not suggesting it. I do not know. But I say that the danger of it is there and, of course, we sat here with him as a co-defendant for ten days, and then, he has a dual role. He has information, whether he has conveyed it to them, I don't know, but he has been talking with these agents—

The Court: Mr. Lavine, you are voicing suspicion now.

Mr. Lavine: Yes, but they are reasonable suspicions, your Honor.

The Court: If there is anything to support them you bring them to the attention of the Court.

Mr. Lavine: Well, I am just renewing my motion now on that question.

The Court: There is no such ground as you suggested for granting the motion at this time."

The underlying facts surrounding this objection is due to evidence showing that Filicia was an informer for a considerable time prior to his taking the witness stand on the day in question. All of this was without the knowledge of counsel for these petitioners. As a defendant he and his counsel met with and was helping prepare the case for himself and others and naturally he obtained information and plans of the defense in several instances. Unbeknown to undersigned counsel, and to his own counsel, Filicia had been informing on several others of these defendants prior to the indictment and was in close contact with agents Ripberger, Voll and Chappell, and in such capacity was instrumental in at least six sales of narcotics to different persons in this case. He frequently met with these agents in different places (60a-61a-62a). They gave him the money and he proceeded to make the buys, and as stated in his own words, "I decided to play along with him." (62a.) He was working with them in September of 1953, during the time that he claimed he was in Erie, Pennsylvania, when as a result thereof two of these petitioners were charged with the two substantive offenses claimed to have been committed in September of 1953. In October of 1953 he was instrumental in the arrest of Mandanici in acting as an informer at the request of Voll and Chappell. (67a.) He worked with them at the end of October, 1953, when the Government agents stated that they prearranged some of the actions of Filicia in the handling of these narcotics. (150b, Government's App.) It should be noted that while both the Government agents and Filicia agree that he violated the law on numerous occasions, no arrest of Filicia was made for any offense that he committed until May, 1954, when he was arrested for a narcotics offense allegedly committed one year prior. We do not know all of the

relationship between the agents and Filicia but certainly we know enough to form an opinion that there was quite a community of interest between at least four of the Government agents and Filicia during a considerable period of time.

As was stated to the Court (167b, Government's App.), Filicia after indictment became a defendant and then began to prepare his case together with several of the other defendants, including Poliafico, and needless to say learned considerable of the plan of the defense. After that he sat in the courtroom for ten days with the defendants and their counsel and was in on their conferences and consultations pertaining to the defense. Then suddenly, on the tenth day of the trial, he offers a plea of guilty, whereupon the Government immediately dropped seven of the counts in the indictment as against him. Even his own lawyer had no prior knowledge of his intent to plead guilty. That, too, would indicate a community of interest between Filicia and the Government and surely his mingling and planning his defense with several of the other defendants, and from his actions and activities that we were apprised of during the trial, we are justified in claiming that there was a community of interest between Filicia and the Government, and we have a right to believe that he did disclose whatever he knew that might have helped him in obtaining the dropping of these seven counts.

We called this to the attention of the Trial Judge. It was timely, in fact it was before Filicia was permitted to take the witness stand, but the Court denied our objection. We believe such overruling constitutes prejudicial and reversible error.

On page 21 of the Brief in Opposition, the Government claims that ours is a parallel situation as was found in the

Carrado case, 210 F. 2d 712, 718-719. We disagree. In the *Carrado* case it was a different situation entirely. We have a special statute of the District of Columbia which is known as Section 23-110 of the District of Columbia Code 1951, the pertinent portion of said Section applicable is as follows:

> "When two or more persons are jointly indicted the Court may, before a defendant has gone into his defense, direct any such defendant to be discharged, that he may be a witness for the United States * * *."

The Court in the *Carrado* case held that the Code Section is not the source of the Trial Judge's authority to dismiss a defendant so he may be a witness against his former co-defendants, but is an immunity statute enacted for the benefit and protection of a defendant who is discharged for that purpose *before he has been in jeopardy*. The *Carrado* opinion mostly deals with the phrase, "Before a defendant has gone into his defense," and whether or not that begins from the moment the jury is sworn in any particular case. In any event, this is a particular statute applicable only to the District of Columbia; that while it resembles our case in one particular, it does not contain the important other particulars that we have set forth herein surrounding Filicia in the case at bar.

We say that the *Caldwell* case, 205 F. 2d 879, is an applicable case, rather than the *Carrado* case. In the *Caldwell* case one Bradley was proven to be engaged in a dual capacity as defense assistant and Government agent. He so conducted himself that he gained free access to the planning of certain members of the defense. In the case at bar Filicia gained free access with certain defendants in their lawyers' offices and learned some of the plans for the defense, and for ten days sat with the defendants and

their counsel and conferred with them and also learned about the plans of their defense. It was later discovered that at a time prior, and also at about the same time, he was acting in consort with the Government agents who were witnesses in this case against the defendants, and then suddenly, without notice to any of the counsel or even to his own counsel, who did not have any prior notice, he entered a plea of guilty, at which time seven of the counts were dropped the day before his testimony, which would indicate that there was a prearrangement that had been going on between Filicia and these Government agents prior to and during the hearing of this case which permitted him to sit in the Courtroom for ten days and listen to many witnesses' testimony and then enable him to take the witness stand on the eleventh day in corroboration of a good bit of that testimony.

Because of the actions of this Filicia and the manner in which he conducted himself, it is only natural to believe that he did convey information to some of the agents with whom he was dealing and in that way it would amount to giving away plans for the defense. While it is true that we do not know positively that this so happened, it is a very fair assumption in view of the close connection between Felicia and the government agents and their many dealings under those circumstances, as was disclosed by the testimony during the trial.

In order to be entirely fair about this, in view of counsel's calling it to the attention of the Court prior to Filicia's testimony, we contend the objection should have been sustained and Filicia's testimony constitutes, in our opinion, prejudicial error, and therefore we feel that the *Caldwell* case, rather than the *Carrado* case, applies.

ARGUMENT ON GROUND 3.

On page 30 of Government's brief in opposition, the pleader says:

> "Petitioner Poliafico alleges as error (Pet. 27-31), the refusal of the trial judge to instruct the jury that evidence of his good character *in itself* might be sufficient to create a reasonable doubt as to his guilt."

The Trial Judge did not give that charge. (Government's brief, page 30.)

Then this brief continues to interpret the meaning of *Edgington vs. United States,* 164 U. S. 361, and admits that this is "the leading case." However, the interpretation falls far short of the actual holding as well as the meaning of the case. For instance, the briefer claims that the only purpose and meaning of the holding in *Edgington* is (page 30):

> "* * * that it is error for the trial court to tell the jury to consider character evidence only when the scales are already in balance."

If that is a fair interpretation of *Edgington* it is only the *first part of that case.* The other part, which is just as important, if not more so, is completely omitted by the pleader:

> "The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it, the other evidence would be convincing."

This second part of that holding in *Edgington* is certainly applicable to petitioner Poliafico. *All* of the testimony against him came from three disreputable persons: Mandanici, a self-admitted narcotics peddler and a convicted felon; Consolo, a self-admitted narcotics peddler and convicted on several occasions for other felonies and

Angelo Felicia, a self-admitted narcotics peddler and convicted felon on several occasions. No other testimony was offered by the Government bearing on the charges of the indictment affecting Poliafico.

Poliafico, on the other hand, has never been convicted of any offense during his 45-year lifetime.

Isn't it fair to hold that the Supreme Court in *Edgington* had just such a situation in mind when it said:

> "The circumstances may be such that an established reputation for good character, if it is relevant to the issue * * *."

We couldn't get a more fitting case if we tried. Certainly the circumstances here establish that Poliafico's reputation was good and that such fact was relevant to the issue, inasmuch as there were no other witnesses except the three co-conspirators named above, each one of them a convicted felon in addition to being self-admitted dope peddlers whose testimony was pitted against Poliafico's, who is without conviction of crime.

We note that the briefer in the brief in opposition says, "we do not believe that the statement in *Edgington* that character evidence may alone create a reasonable doubt was an announcement of a rule of law." We confess we are at a loss to understand just what that means. Are we to consider the upper portion a rule of law and the lower portion merely a statement which could be ignored? Is it the contention of counsel that *Edgington* does not mean what it says? If it would be merely a statement expressing a result, then why did *Edgington* use the phrase, "would *alone* create a reasonable doubt," and then proceed and add further, "although without it the other evidence would be convincing"? Isn't that in itself "a rule of law"? And again, the Seventh and the Tenth Circuits both reversed cases where the District Court Judge refused to

charge as we have requested herein, and as *Edgington* actually states.

The briefer here chooses to follow the Second Circuit in Antonelli, as taken from the case of *Nash vs. United States,* 54 F. 2d 1006, and it would appear, also, that the Sixth Circuit is following Antonelli. But the Government brief in our case admits that some Circuits, "including the Seventh in *U. S. v. Donnelly,* 179 F. 2d 227, and the Tenth in *Hayes v. U. S.,* 227 F. 2d, 540," hold that an instruction on good character *must charge,* "that it might in itself create a reasonable doubt." That being the case there surely is a conflict between the Circuits, and it is vitally important here because in the case at bar the lines are drawn as tightly as they might possibly be drawn between the first part of the opinion and the latter part of the opinion because certainly the latter part of the opinion, where it explains what "the circumstances may be," can only mean the circumstances that are found in our case. Where the testimony upon which the jury must rely comes from a corrupt source as it did in our case as against a witness who has heretofore established a reputation for good character, and especially, as in our case, where it is relevant to the issue, having those circumstances and that situation, it is only sensible to believe that a reputation for good character *alone* would create a reasonable doubt in a case like ours, although without it, it may very well be that the other evidence would be convincing.

It isn't only that we would like to read *Edgington* in this way, and call to our support some other Circuits, including the Seventh and the Tenth as against the Second and the Sixth Circuits, but that an analysis of *Edgington* compels one to accept our interpretation of it rather than the other interpretation, which is subscribed to by the Government's brief in opposition.

Because of that, we feel that prejudicial error was committed by the Court in its refusal to so charge.

ARGUMENT ON GROUND 4.

Whether motions to dismiss Count I (conspiracy) of the indictment and a verdict of acquittal thereon in favor of Pieri's other petitioners should have been granted by the trial court on the ground of variance between the proof on trial and the charge in the indictment, and whether such refusal by the District Court constituted reversible error.

Reconsideration by this Honorable Court is sought because of what is believed to be a misunderstanding of the factual situation prevailing on trial of the instant case.

The rule applicable to this situation was pronounced by the United States Supreme Court in *Kotteakos vs. U. S.*, 328 U. S. 750, 90 L. ed. 1557, 66 Sup. Ct. 1239 (1946), wherein the Supreme Court reversed judgments of conviction against several supposed conspirators who had been jointly indicted under a single general charge of conspiracy. The facts of that case were markedly similar to the facts presented in the instant case:

Kotteakos and thirty-one (31) other defendants were jointly indicted for a single general conspiracy, together with several named co-conspirators. Nineteen (19) of such defendants were tried together. (Here eighteen (18).)

The case of thirteen (13) defendants was submitted to the jury, the exact number in the instant case.

In *Kotteakos*, it was developed on trial that eight (8) separate conspiracies were established, whereas in the present matter, not less than five (5) separate conspiracies were established.

In the *Kotteakos* case, no knowledge on the part of one (1) conspirator was shown to have existed as to any other supposed co-conspirators, except that one (1) defendant was common to all conspirators. In this matter, no knowledge on the part of any set of supposed conspirators was shown, as to the existence or activity of any other supposed group of conspirators (suppliers), except that each group or supplier was supposed to have had knowledge of the activities of those supposed conspirators composing the Cleveland "core."

The Supreme Court, in reversing the judgments of conviction in *Kotteakos*, used the analogy of the spokes of a wheel all meeting at a common hub (or "core") and found that an indictment charging a single general conspiracy was duplicitous, and was defective thereby, unless some cross-knowledge between the spokes of such wheel existed.

It was urged by petitioner Pieri before trial, on motion for severance, and again at the end of the Government's case, again at the end of the entire case, also after verdict, and also in support of a motion for new trial, that such variance existed, that acquittal should be directed, because of the necessary confusion resulting from the proof of all such separate conspiracies, and that substantial error had occurred.

Because of the number of the defendants and the number of the defendants' counsel, it was impossible for all defendants and all counsel to be within the bar of the Court. Because of the limitation of space, six (6) defendants were beyond the bar in the spectator section of the Court, and six (6) attorneys representing eight (8) defendants were also without the bar. The petitioner, Pieri, and counsel for such Pieri were included in those persons placed in the spectator section.

In addition, because of the limited space, because of seating arrangements, and because of the congestion in the well of the Court, four (4) of the defendants were physically separated from counsel and could not be interviewed by counsel without counsel crossing the trial Court, and speaking to any such defendant in the presence of others, or in half-asides.

The Courtroom is of average size and was the largest room available in the District Court for trial. The acoustics however, of such Courtroom, were both by the admission of the Court, and by actual demonstration on trial, of such character that an amplification system was necessary. However, in providing such amplification system, the trial Court secured only a microphone for the witness testifying, had none for itself, and had none available for any counsel. As a consequence thereof, counsel for all defendants, and particularly counsel for those defendants beyond the bar, which included the petitioner Pieri, were constantly faced with a situation where all or a good part of the questions, answers, objections, rulings and arguments were muffled, and were in whole or in part, out of the hearing of such counsel.

All defendants' counsel objected during the course of trial to the manner of trial, and to the trial circumstances, and all defendants moved for severance on various grounds, particularly upon the grounds stated in *Kotteakos vs. U. S.*, 328 U. S. 750, 90 L. Ed. 1557, 66 Sup. Ct. 1239, both before trial, during and after trial.

During the course of one trial day, the record disclosed that there were fifty-seven (57) specific statements by counsel to the Court that the witness could not be heard, so that the witness was forced to repeat. This, in spite of the fact that the witness, and the witness alone, had available amplification equipment.

It is fair to say that all counsel, both for prosecution and defense, acted with the highest regard for the Court, and with courtesy toward one another, and that all counsel exerted every effort to so conduct the trial as to expedite such trial, and so as to minimize the trial difficulties insofar as possible. However, in spite of the best efforts of counsel, and in spite of the consideration of the Court, the trial conditions themselves were such as to render the proceedings entirely beyond the ability of counsel to cope with the same.

It is respectfully submitted that reconsideration should be given in this respect as to petitioners Pieri and Erra, particularly Pieri. In all material respects, the instant case presents an alleged conspiracy analogous to the "wheel" found in *Kotteakos* (*supra*), with substantial error present because of a failure to direct separate trial as to such petitioners.

That particularly as to petitioner Pieri, the testimony of Government witnesses, even if believed, was to the effect that the last supplier transaction occurred at least seven months prior to any activity on the part of the said Pieri, that further the alleged conspiracy had suspended, or may have inferentially ceased, for other reasons, at least six months before any such alleged activity on the part of the said Pieri, and that considerable and heated differences had arisen between the various alleged conspirators constituting the Cleveland "core," of which "core" Pieri had no part, all leading to a factual question as to whether one conspiracy had ceased and a second alleged conspiracy had later come about.

This fact question was *not* put to the jury, and this Court is not, therefore, bound by any finding.

That the situation is not at all analogous to that found in *U. S. vs. Tramaglino*, 197 F. 2d 928 (C. A. 2), where

a relatively small group of defendants was involved, where all defendants were known to each other, as would appear from the decision therein, and where all persons dealt either upon the same level or in chain fashion.

That further because of the coincidental application of the rule in the instant case of the rule enunciated by this Court in *Krulewitch vs. U. S.*, 336 U. S. 440, 93 L. Ed. 790, and recently applied by this Court in *Paoli vs. U. S.*, 352 U. S. ____, 1 L. Ed. 2d 278, 77 S. Ct. ____ (adv. bull. No. 5 L. Ed.), decided January 14, 1957 (treated *infra*), it is deemed of sufficient importance for this Court to review upon both bases as to such petitioners.

ARGUMENT ON GROUND 5.

During the empanelling of the jury the appellant objected to the method and manner of the selection of the petit jury and the Grand Jury by claiming that there were certain racial discriminations in the selection of this jury panel by the Jury Commissioner and the Clerk of the District Court. Counsel for the petitioners then and there requested a hearing upon this claim, specifically requesting that the Jury Commissioner be sworn. The Court refused to grant such a hearing.

In addition to material supplied heretofore in petition for certiorari herein, there is herewith submitted, and the reconsideration of the Court is asked of the following matter.

Petitioners challenge the petit array, during the drawing of a jury, and prior to the swearing of any juror, upon representation of belief that the method of empanelling such petit array did not comply with the constitutional and legal requirements therefor, and demanded a hearing thereon. Such demand was denied.

During the course of argument, certain statement of apparent exclusion were made, as submitted heretofore, and further, the attention of the Court was called to the matter of *U. S. vs. Brandt* (not reported) upon which a similar challenge to a Grand Jury array had been made before the same trial judge, where hearing had been permitted, and apparent exclusion discovered.

That it is submitted that in due course the conviction of several defendants in such action *U. S. vs. Brandt* will be before this Court, and that among other questions for review therein there will be raised the denial by the trial court of a dismissal of the indictment therein, because of the failure to properly empanel a Grand Jury.

That the method and manner of empanelling a Grand Jury and a petit array are identical in the Northern District of Ohio.

That in the event that this Court later finds in such action that such method of empanelling was improper, without inquiring, however, into such question herein it might well deprive these petitioners of substantial justice, in that they would then be beyond review.

ARGUMENT ON GROUND 6.

The oral declaration of co-conspirators, made long after determination of the alleged conspiracy terminated, were admitted into evidence by the trial Court over the repeated and strenuous objections of all counsel for all petitioners, and that such constituted reversible error.

That this question is of the highest importance, and due to inadvertence was not submitted in petition for certiorari, such petition for certiorari having been assembled from various points, through the efforts of various attorneys.

That the alleged, general conspiracy herein, was charged to have begun in the month of January, 1952, and was shown to have terminated, if such conspiracy existed, on the 22nd day of October, 1953, with the arrest of one James Mandanici.

That after such arrest of such Mandanici, in the early part of the year 1954, such Mandanici plead guilty to a substantive offense involving narcotic drugs; he was thereupon imprisoned, under sentence in various Federal institutions.

That to the date of his sentence, and for some weeks thereafter, to a date in March, 1954, said Mandanici made no declaration, oral or written, involving any person other than himself.

That beginning in March, 1954, long after the cessation of the alleged conspiracy, the said Mandanici first began to make oral and written declarations involving prior alleged conspirators, and renewed such declarations by oral testimony on trial.

That although certain narcotics were established as such, on trial, no independent testimony or other evidence connected the petitioner Pieri, petitioner Erra, or other petitioners therewith, except by such declarations of the said Mandanici or other co-conspirators. That in each instance, the declaration of any alleged co-conspirator which related to any other alleged co-conspirator, was made for the first time long after the termination of the alleged conspiracy, and only after the first such declaration made by the conspirator Mandanici in March, 1954.

That as to petitioner Pieri, the only evidence directly connecting him with any of the alleged crimes was the testimony of the said Mandanici, and the testimony of one Filicia; that the declarations of the said Filicia all occurred subsequent to March, 1954.

That no independent proof of any substantial nature whatsoever was adduced on trial to connect petitioner Pieri with any such activity, and that the conviction of such Pieri must rest solely upon such declarations of the said Mandanici and the said Filicia.

That the supposed activities of petitioner Pieri occurred between May, 1953, and September, 1953, that the arrest of the said Mandanici, which terminated the alleged conspiracy, occurred October 22, 1953, and that the first declaration on the part of either Mandanici or Filicia occurred in March, 1954.

That it is submitted under the rule enunciated in *Krulewitch vs. U. S.*, 336 U. S. 440, 93 L. Ed. 790, and recently applied in *Paoli vs. U. S.* (cited *supra*), such declaration of a co-conspirator cannot be received in evidence except against the person uttering the same and against any person specifically present at the time of occurrence about which such declaration is made, and that even then, such may be received under such limited conditions only if the Court properly instructs the jury to apply such declaration against such particular individuals and no other.

In the instant case the Court not only permitted the receiving of such evidence, over the repeated objection of all counsel, but also further directed that it be received as to all persons found joining in such conspiracy.

Needless to say, the Trial Court gave no limiting instructions to the jury, but gave a contrary instruction.

Of importance here, petitioner Pieri made motion before trial for separate trial, and that such motion was joined in by all petitioners. That such motion was denied as to all petitioners and exception taken.

Particular attention should be paid to the factual circumstances of trial, and the mass nature thereof, as recited heretofore.

Even appropriate instructions would have been hopelessly confusing to the jury, in the light of the comments made in the concurring opinions in *Krulewitch* (*supra*); a fair trial could not have resulted.

ARGUMENT ON GROUND 7.

When witnesses Brunello and Artino repudiated their prior Grand Jury testimony by stating flatly that the testimony they gave to the Grand Jury was false, it is our contention that in this event the prosecution should not have proceeded by reading questions and answers from the Grand Jury transcript and in that way spread before the petit jury all the testimony that these two witnesses gave in secret seven months prior. We objected to this testimony, first because the Government claimed the right to elicit this information by reading from the Grand Jury transcript on the ground that it was being done to refresh the witnesses' memory and also on the ground of surprise. It must be remembered that our objection was not made for the purpose of foreclosing the Government from eliciting information or seeking testimony from these two witnesses. Our objection was on the ground that the Government had no right to use the Grand Jury transcript for the reasons they gave, namely, refreshing the witnesses' memory and on the ground of surprise, because when a man says that he lied in his testimony to the Grand Jury, then there is nothing to refresh, no matter how surprised the prosecution may be.

We think it was error on the part of the Court to permit the District Attorney to use this Grand Jury tran-

script by way of questions and answers because he actually got before the petit jury the testimony that these witnesses gave to the Grand Jury, and all of this under the guise that they were attempting to refresh the memory of a witness who never stated that he forgot anything. When a man said he lied in his testimony, that means that he remembered what he said but he is confessing to lies. There is nothing to refresh here. The only reason the District Attorney proceeded was, as we said, to get this alleged false testimony before the petit jury and in that way he accomplished another factor, namely, he impeached his own witness.

We hold now, and always have contended, that the Government had a perfect right to seek testimony from Brunello and Artino regardless of their statement that they lied in their previous testimony. But the testimony they had a right to seek was by any questions and answers without having any regard to the previous questions and answers before the Grand Jury, and certainly were not permitted to use the Grand Jury transcript by asking the very same questions and reading the answers that the witnesses said were all lies.

If the Government had pursued the proper procedure, if it wanted to obtain evidence from Brunello and Artino it could have done so by new questions and answers, and that is something no one could have objected to. But when they proceeded in the manner they did, they prejudiced the entire case involving every defendant in the Courtroom, and when the District Judge permitted them to do so, over objection, he was in error and prejudicial error resulted for which a new trial ought to be granted. Such are the holdings in the very cases that were cited by the Government, as well as were cited by undersigned Coun-

sel in their briefs heretofore. To the same effect is *U. S. vs. Socony-Vacuum Oil Company*, 310 U. S. 150.

There could be no other explanation except the only one, specifically, that the Government accomplished by proceeding over objection what they could not have accomplished in any other way, and that is to spread before the petit jury practically all the evidence these witnesses gave before the Grand Jury.

Therefore, it is reasonable to deduce that in the case at bar this Grand Jury testimony was used not for the purpose of refreshing the recollection of the witnesses, but was used solely and deliberately to get before this petit jury this Grand Jury testimony, which is exactly in line with what the Court said in the *Socony-Vacuum* case, 310 U. S. 150, 60 S. Ct. 811, where on page 849 the Court said:

> "If the record showed that the refreshing material was deliberately used for purposes not material to the issues but to arouse the passions of the Jurors so that an objective appraisal of the evidence was unlikely, there would be reversible error. Likewise, there would be error where under the pretext of refreshing a witness' recollection the prior testimony was introduced as evidence."

The admission of this testimony, under the circumstances in our case, was prejudicial and reversible error.

CONCLUSION.

For the reasons hereinabove set forth we respectfully urge this Honorable Court to grant the petitioners a rehearing.

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Certificate of Counsel.

We, the undersigned counsel for the petitioners in the above-entitled cause, do hereby certify that the foregoing Petition for a Rehearing of this cause is presented in good faith and not for delay.

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